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Thenegaran a/l Murugan & Anor v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NOS B-05–145, 154 AND 166 OF 2008
LINTON ALBERT, LIM YEE LAN JJCA AND ZAWAWI SALLEH J
16 SEPTEMBER 2012

C

Criminal Procedure — Defence — Alibi — Whether accused's bare denial that he was at crime scene when murder happened unacceptable — Whether such defence failed against eye witness account that he committed the crime — Whether mere fact eye witnesses were related to or close friends of deceased adversely affected their credibility — Whether testimonies of eye witnesses sufficiently corroborated to point to accused's guilt

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This judgment concerned only the first appellant ('the accused') who appealed against his conviction and sentence of death by the High Court on a charge of murdering a 34-year-old man ('the deceased') in front of a Hindu temple when celebrations to mark a religious event was underway. Of the 21 witnesses called by the prosecution, four were eye witnesses to a fight that took place in front of the temple. Three of those eye witnesses testified that they saw the accused stab the deceased in the chest with a knife. Their versions of how the stabbing took place were similar. The accused's defence, however, was that when a fight broke out in front of the temple started by a group of unknown men wearing full-face helmets, he fled the scene and did not know about the deceased's death until later. The High Court rejected the defence, which was never put to the prosecution's witnesses during the course of the prosecution's case, as an afterthought. The Court held there was no reason for the eye witnesses to fabricate their testimony against the accused whilst the case for the defence did not contradict or refute the prosecution's version but simply asserted that the accused was not at the scene at the material time. This was held to be insufficient to raise a reasonable doubt on the prosecution's case. The accused appealed to the Court of Appeal against conviction and sentence arguing, inter alia, that the charge against him was defective as it did not indicate whether the offence was murder or culpable homicide and that without independent corroboration it was unsafe to rely on the evidence of the eye witnesses who were either related to or were close friends of the deceased.

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Held, dismissing the appeal and affirming the conviction and sentence:

(1) The accused's defence that he was not at the scene when the deceased was stabbed was bare and unsubstantiated and a self-serving denial that had no credence. Alibi was the weakest of all defences because it was easy to concoct and difficult to prove. In the light of the positive and categorical

identification by eye witnesses that the accused was the perpetrator of the crime, his defence could not succeed (see para 63).

(2) The mere fact the eye witnesses were either related to or close friends of the deceased was not proof sufficient to disregard their testimonies or render the same less worthy of credit. No reason was advanced by the accused to show the witnesses had reason to shield the actual culprit and falsely implicate him (see paras 58 & 60).

(3) The eye witnesses had identified the accused as among the persons who were present at the crime scene and they had given statements to the police as to his identity and participation prior to the identification parade. Their evidence, considered cumulatively, amounted to reliable identification. There was corroboration for the eye witnesses' version that the accused was the culprit in the stabbing of the deceased. There was no reason to doubt the veracity and accuracy of the identification made by them (see paras 51 & 54).

(4) No complaint about the charge being defective was taken at the trial. The omission to mention s 299 or s 300 of the Criminal Procedure Code (being the definitions of murder and culpable homicide) in the charge did not render it defective. No prejudice was caused to the accused and the appeal record contained nothing to show the accused was confused, misled or bewildered by the charge (see paras 39–40 & 44).

[Bahasa Malaysia summary

Penghakiman ini hanya berkaitan perayu pertama ('tertuduh') yang telah merayu terhadap sabitan dan hukuman matinya oleh Mahkamah Tinggi atas pertuduhan membunuh seorang lelaki berumur 34 tahun ('si mati') di hadapan kuil Hindu semasa sambutan meraikan upacara keagamaan sedang berlangsung. Daripada 21 orang saksi yang dipanggil pihak pendakwaan, empat merupakan saksi utama kepada pergaduhan yang berlaku di hadapan kuil tersebut. Tiga daripada saksi utama itu telah memberi keterangan bahawa mereka melihat tertuduh menikam si mati di dada dengan pisau. Versi mereka bagaimana penikaman berlaku adalah sama. Pembelaan tertuduh, bagaimanapun, adalah bahawa apabila pergaduhan bermula di hadapan kuil tersebut oleh sekumpulan lelaki yang tidak dikenali yang memakai topi keledar menutupi penuh bahagian muka, dia lari meninggalkan tempat kejadian dan tidak mengetahui tentang kematian si mati sehingga kemudiannya. Mahkamah Tinggi menolak pembelaan itu, yang tidak ditujukan kepada saksi-saksi pendakwaan semasa kes pendakwaan dijalankan, sebagai suatu yang telah difikirkan kemudian. Mahkamah memutuskan tiada sebab untuk saksi-saksi utama tersebut memalsukan keterangan mereka terhadap tertuduh walhal kes untuk pembelaan tidak bercanggah atau menafikan versi pendakwaan tetapi hanya menegaskan bahawa tertuduh tidak berada di tempat kejadian pada masa matan. Ini telah diputuskan sebagai tidak

mencukupi untuk menimbulkan keraguan munasabah terhadap kes pendakwaan. Tertuduh telah merayu kepada Mahkamah Rayuan terhadap sabitan dan hukuman dengan berhujah, antara lain, bahawa pertuduhan terhadapnya adalah defektif kerana ia tidak menunjukkan sama ada kesalahan itu adalah membunuh atau homisid salah dan bahawa tanpa sokongan tersendiri ia tidak selamat untuk bergantung kepada keterangan saksi-saksi utama yang sama ada mempunyai kaitan atau kawan rapat dengan si mati.

Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman:

(1) Pembelaan tertuduh bahawa dia tidak berada di tempat kejadian semasa si mati ditikam adalah kosong dan tidak berasas dan suatu penafian mementingkan diri sendiri yang tidak boleh dipercayai. Alibi adalah pembelaan paling lemah dari semua pembelaan kerana ia adalah mudah untuk direka-reka dan sukar untuk dibuktikan. Berdasarkan pengecaman positif dan mengikut kategori oleh saksi-saksi utama bahawa tertuduh merupakan pelaku jenayah, pembelaannya tidak boleh berjaya (lihat perenggan 63).

(2) Hakikat yang saksi-saksi utama itu sama ada mempunyai kaitan atau kawan rapat dengan si mati bukan bukti mencukupi untuk tidak mengambil kira keterangan mereka atau menyebabkan yang sama kurang kebolehpercayaannya. Tiada sebab dikemukakan oleh tertuduh untuk menunjukkan saksi-saksi mempunyai sebab untuk melindungi pelaku sebenar dan secara palsu mengaitkannya (lihat perenggan 58 & 60).

(3) Saksi-saksi utama telah mengecam tertuduh sebagai antara orang yang berada di tempat kejadian jenayah dan mereka telah memberikan kenyataan kepada polis berhubung identitinya dan penglibatannya sebelum barisan pengecaman. Keterangan mereka, diambil kira secara kumulatif, membentuk pengecaman yang boleh dipercayai. Terdapat sokongan untuk versi saksi-saksi utama bahawa tertuduh adalah pelaku yang menikam si mati. Tiada sebab untuk meragui kebenaran dan ketepatan pengecaman yang dibuat oleh mereka (lihat perenggan 51 & 54).

(4) Tiada aduan berhubung pertuduhan itu defektif yang diambil semasa perbicaraan. Peninggalan untuk menyebut tentang s 299 atau s 300 Kanun Acara Jenayah (iaitu definisi bunuh dan homisid salah) dalam pertuduhan itu tidak menyebabkannya defektif. Tiada prejudis disebabkan terhadap tertuduh dan rekod rayuan tidak mengandungi apa-apa untuk menunjukkan tertuduh keliru, dikelirukan atau bingung dengan pertuduhan itu (lihat perenggan 39–40 & 44).]

Notes

For cases on alibi, see 5(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 1859–1890.

Cases referred to

Annuareddy Sambasiva Reddy v State of AP AIR 2009 SC 2661, SC (refd)
Balasingham v PP [1959] MLJ 193 (refd)
C Mohamed v PP [1974] 1 MLJ 25 (refd)
Dato Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232, FC (refd)
Harjit Singh v State of Punjab [2008] 1 SCC (Cri) 72, HC (refd)
Hashim bin Mat Isa v PP [1950] MLJ 94, CA (refd)
Heng Aik Ren Thomas v PP [1998] 3 SLR 465, CA (refd)
Illian & Anor v PP [1988] 1 MLJ 421, SC (refd)
Jaafar bin Ali v PP [1998] 4 MLJ 406, HC (refd)
Jagar Singh v PP [1936] MLJ 92 (refd)
Kamakanathan v State of Tamil Nadu [2006] 1 SCC 463, SC (refd)
Law Tim Wah v PP [1978] 1 MLJ 167, FC (refd)
Lim Kheak Teong v PP [1985] 1 MLJ 38, FC (refd)
Liow Siow Long v PP [1970] 1 MLJ 40; [1969] 1 LNS 98 (refd)
Low Seng Wah v PP [1962] MLJ 107 (refd)
Om Prakash v State of Uttar Pradesh AIR 1960 SC 409, SC (refd)
P Rajagopal vs The Inspector of Police dated 19 March 2009, HC (refd)
Periasamy s/o Sinnappan & Anor v PP [1996] 2 MLJ 557, CA (refd)
PP v Margarita B Cruz [1988] 1 MLJ 539 (refd)
PP v Munusamy [1980] 2 MLJ 133, FC (refd)
PP v Wan Razali Kassim [1970] 2 MLJ 79, FC (refd)
PP v Wong Moy [1988] 3 MLJ 280; [1988] 2 CLJ 521, HC (refd)
R v Turnbull & Ors [1976] 3 All ER 549, CA (refd)
RK Dalmia v Delhi Administration AIR 1962 SC 1821 (refd)
Ramakrishnan s/o Ramayan v PP [1983] 3 SLR 645, HC (refd)
Rattan Singh v PP [1971] 1 MLJ 162, HC (refd)
Rogayah bte Che Mat v PP [2001] 5 MLJ 77, HC (refd)
S v Mthetwa [1972] (3) SA 766 (A) (refd)
Santosh Kumari v State of Jammu And Kashmir & Ors [2011] 9 Supreme Court Cases 234, SC (refd)
Tan Thong Jin v PP [2002] 3 MLJ 695; [2002] 3 CLJ 552, CA (refd)
Tulsi Ram and Others v State of Uttar Pradesh AIR 1963 SC 666, SC (refd)
VC Shukla v State Through CBI AIR 1980 SC 962; 1980 SCR (2) 380, SC (refd)
Yau Heng Fang v PP [1985] 2 MLJ 335, SC (refd)
Zulkiflee bin Mohd Dom v PP [1997] 4 MLJ 161, HC (refd)

Legislation referred to

Criminal Procedure Code ss 152(2), 156, Second Schedule
Penal Code ss 109, 299, 300, 302, 304(a), 420

Appeal From: Criminal Trial 45–64, 65 & 74 of 2005 (High Court, Shah Alam)

(Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.

Zawawi Salleh J (delivering judgment of the court):

THE ANTECEDENTS

[1] Initially, three accused persons, namely Nagathevan a/l Manoharan ('the first accused'), Thenegaran a/l Murugan ('the second accused') and Sivan a/l Kanthasamy ('the third accused') were separately charged before the High Court, Shah Alam, Selangor. The first accused was alleged to have abetted the second accused to commit the offence of murder against two of the deceaseds ('Raguram a/l Sandivelu and Murali a/l Rengasamy'). The third accused was alleged to have committed the murder of the third deceased ('Thiagarajan a/l Venketaswaran Roa').

[2] All the charges were heard together by the High Court.

[3] At the end of the prosecution case, the first accused was acquitted and discharged while the second and third accuseds were ordered to enter their defence.

[4] At the end of the defence case, the High Court, in its common judgment, made the following orders:

(a) convicted the second accused under s 302 of the Penal Code and sentenced him to death for murdering the first deceased;

(b) amended the original charge against the second accused under s 302 of the Penal Code for murdering the second deceased to one under s 304(a) of the same Code; and

(c) amended the original charge against the third accused under s 302 of the Penal Code for murdering the third deceased to one under s 304(a) of the same Code.

THE APPEALS

[5] There were several appeals lodged against the common judgment of the High Court as follows:

(a) an appeal by Thenegaran a/l Murugan ('the second accused') against the

decision of the High Court which convicted him under s 302 of the Penal Code and sentenced him to death for murdering the first deceased and also his appeal against the conviction under s 304(a) of the Penal Code for culpable homicide not amounting to murder for the death of the second deceased;

(b) an appeal by Sivan a/l Kanthasamy ('the third accused') against the decision of the High Court which convicted him under s 304(a) of the Penal Code for culpable homicide not amounting to murder for the death of the third deceased; and

(c) a cross-appeal by the public prosecutor against the decision of the High Court which amended:

(i) the original charge against the second accused under s 302 of the Penal Code for murdering the second deceased to one under s 304(a) of the same Code; and

(ii) the original charge against the third accused under s 302 of the Penal Code for murdering the third deceased to one under s 304(a) of the same Code.

[6] On the day of the hearing of these appeals, the second accused was produced in court but the third accused was absent. Encik Sreekant Pillai, learned counsel appearing for the second accused and Puan Munanyza bt Mustafa, learned deputy prosecutor appearing for the public prosecutor proposed that the hearing should only proceed in respect of the appeal by the second accused against the decision of the High Court in convicting him under s 302 of the Penal code and sentencing to death for murdering the first deceased.

[7] We agree. Due to the absence of the third accused, it would be unfair and prejudicial to proceed with the hearing of other appeals. It should be noted that in respect of the second charge, the appellant was charged with an offence punishable under s 302 of the Penal Code read together with s 109 of the same Code.

[8] So, this judgment is only concerned with the case against the second accused, the appellant herein, in respect of his appeal against the conviction and sentence under s 302 of the Penal Code (Case No B-05–145 of 2008).

[9] We have heard learned counsel for the appellant and learned deputy public prosecutor. We have scrutinised the entire evidence adduced before the High Court. We have scrutinised the impugned judgment. We unanimously dismissed the appeal and affirmed the conviction and sentence passed by the High Court.

[10] We now give the reasons for our decision.

THE CHARGE

[11] For reasons which would appear later in this judgment, it is necessary to reproduce the charge against the appellant. The charge reads as follows:

> Bahawa kamu pada 19 September 2004 jam lebih kurang 12.05 pagi di hadapan Kuil Sri Maha Mariyaman, Jalan Tepi Sungai, Klang di dalam Daerah Klang di dalam Negeri Selangor, dengan niat telah melakukan kesalahan bunuh hingga menyebabkan kematian seorang lelaki India bernama Raguram a/l Sandivelu (KPT: 780326-10-5495) oleh itu kamu telah melakukan kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan.

FACT OF THE CASE

[12] The facts of the case have been admirably captured in the judgment of the High Court. The written judgment of the High Court was extensive. The High Court wrote a lengthy 160 pages grounds of judgment. As will be seen, many of the issues of fact which were considered in it were not in dispute at the trial, and many of the trial court's finding of facts are not affected by the grounds of appeal. No useful purpose will be served by rehashing them in great detail. We will confine our judgment to only those salient's facts that elucidate this judgment.

[13] Just like two sides of the coin, the instant case presents two conflicting versions.

THE PROSECUTION'S VERSION

[14] The prosecution case, in a nutshell, was as follows: Between 11.45pm on the 18 October 2004 and the early hours of the morning 19 October 2004, a Hindu religions festival of Vinayagar Chaturthi was celebrated at the Selva Vinayagar Temple, Klang, Selangor. There was a large procession led by a chariot. Large crowds accompanied the chariot throughout its entire journey, as well as awaits its passage at various points throughout its pre planned route, offering prayers and coconuts.

[15] For the purpose of this festival, a temporary tent like structure had been erected directly opposite the front of the Mariamman Temple. The tent did not have cloth walls extending to the ground. It comprised poles with a roof but with no walls, thereby resembling a shed. A clear view would therefore be had of the surrounding area even from within the structure as there were no walls to the tent, (see exh P5A).

[16] The High Court heard the evidence of 21 witnesses during the course of the prosecution case. Four eye witnesses (SP2, SP3, SP4 and SP5) have given a clear narrative of events as they occurred in the area in front of the Maha Mariamman Temple at Jalan Tepi Sungai, Klang. Three of the eye witnesses have stated in unison that the appellant had stabbed the second deceased ('Raguram') in the chest.

[17] SP2 recounted the following event. At the material time, he was at the tent opposite Mariamman Temple. He saw the deceased dancing in front of the temple. SP3 then heard a lot of noise outside the tent like structure. He heard the sound of shouts and people fighting before the chariot had passed the temple. He moved out of the tent like structure and saw a fight taking place in front of the structure. He saw the first deceased being beaten up but could not identify who specifically had done so. SP2 confirmed that the appellant held the knife in his right hand.

[18] SP3 in his testimony before the High Court has vividly described what had happened at locus criminis. He testified that at the material time, he was in the tent where food was being distributed to the devotees. He heard shout of 'Fight! Fight' in Tamil. When he looked sideways, he saw the appellant had put his hand round the first deceased's neck and pulled him to the edge of the tent. Then SP3 saw the appellant stabbed the first deceased in the chest with a knife. The appellant stood behind the deceased and used his left arm to hold him firmly around the neck and close to the appellant's body. He used his other hand with the knife to stab the deceased in the chest. After the appellant taking the knife out of the deceased's chest, the deceased fell to the ground.

[19] SP4 testified that at the material time he was in the tent when he saw a group of people were dancing in front of the Mariamman Temple. The first deceased was dancing there too. It was at this time that he saw that a fight had erupted. According to SP4, he saw the appellant stabbed the first deceased and he also saw the knife being pulled out by the appellant from the deceased's chest.

[20] SP5 is yet another eye witness. He has given detailed version of the incident. He has testified that he saw the appellant had dragged the first deceased and held him close or hugged him with his left hand and stabbed him with a knife, using his right hand. He was clear about the act of stabbing and was able to demonstrate how the first deceased was held by the appellant.

THE DEFENCE'S VERSION

[21] As against the version stated above, the appellant testified that a fight had broken out at the area in front of the Mariamman Temple, started by a

group of unknown men wearing full-face helmet. The defence claimed both the appellant and third accused had fled the scene when the fight broke out and did not know about the death until later.

[22] As can seen from the impugned judgment, the High Court had carefully assessed, sifted, scanned, scrutinised and appreciated the evidence adduced in the case, keeping in view the surrounding circumstances and the background in which the offence was alleged to have been committed. The High Court found and so held that proof of guilt beyond reasonable doubt had been established by the prosecution, inter alia, against the appellant herein, for the murder of Raguram a/l Sandivelu.

[23] The High Court found that based on the entire evidence before it and the demeanor and responses of the witnesses during the lengthy and exhaustive cross-examination, the witnesses were telling the truth in respect of the material particulars of the case. Although there were some discrepancies, they were not so major or fundamental to warrant a rejection of the entirety of the evidence.

[24] The hallmark of credibility, reliability and truthfulness of a witness is consistency of facts and details. In this regard, the High Court was of the considered opinion that the evidence of the eye witnesses showed a consistency in relation to:

(a) the general timing of the incident;

(b) the presence of all the witnesses, accused persons, witnesses and their friends at the scene of the incident;

(c) the place where the stabbings took place was also commonly described by all the witnesses as being in front of the Mariamman Temple;

(d) the chronology of the occurrences was identical as far as all the eye witnesses are concerned;

(e) the manner in which the injuries were effected;

(f) the events immediately after the incident, although there were differences as to who precisely assisted each of the victims and the manner of assistance that was accorded;

(g) information was given to the police by the eye witnesses within a short time of the incident after the victims had passed away and been taken to the hospital;

(h) the police were able to act on the eye witness accounts to commence investigations and seek the relevant suspects;

(i) the identification of the persons involved was considerably eased by the fact that the eye witnesses and the accused persons knew each other well by sight;

(j) the post-mortem report corroborated the eye witnesses accounts of the infliction of injuries; and

(k) there was corroboration between the several eye witnesses accounts as outlined previously.

[25] There was no room for doubt that the death of the first deceased was not natural but homicidal. The pathologist ('SP20') testified that the cause of death was the stab wound to the heart which would cause excessive bleeding. The pathologist was of the view that a sharp instrument like a knife had been used to cause the injury.

[26] The High Court rejected the defence of the appellant because the essence of his defence was never put to the prosecution witnesses during the course of the prosecution case. According to the High Court, apart from seeking to damage the credibility of the prosecution witnesses, it was never clear what the defence was during the prosecution case. The defence was very much an afterthought that has been fabricated to meet the prosecution case.

[27] The High Court summarised its finding as follows:

> Looking at the entirety of the evidence there appears to be no reason for the eye witnesses to fabricate the entirety of their version of events. Their credibility remains unshaken by the defence version of events which does not serve to refute or contradict their version in detail, but simply removes the key players, ie the accused persons from the scene of the incident at the relevant time. The defence as put through its witnesses appears to have been finely crafted to neatly meet the prosecution case by citing the absence of the accused persons, thereby providing an alibi of sorts which contradicts the prosecution version of events without directly attacking it. In these circumstances, the court concludes that on a consideration of the evidence in its entirety, the appellant failed to raise a reasonable doubt through his defence in respect of the charges brought and proved against him. The prosecution has proved beyond reasonable doubt that the appellant caused the death of the first deceased.

[28] Undoubtedly, this instant case furnishes another occasion for this court to reiterate the trite law that the appellate courts will not disturb the factual findings of the trial court, especially as to credibility of witnesses; that conclusions and findings of fact by the trial court are entitled to great weight on appeal and should not be disturbed except for strong and cogent reasons because the trial court is in a better position to examined real evidence, as well as to observe the demeanor of the witnesses while testifying, (see *Lim Kheak*

Teong v Public Prosecutor [1985] 1 MLJ 38; *Periasamy s/o Sinnappan & Anor v Public Prosecutor* [1996] 2 MLJ 557; *Tan Thong Jin v Public Prosecutor* [2002] 3 MLJ 695; [2002] 3 CLJ 552; *Public Prosecutor v Wan Razali Kassim* [1970] 2 MLJ 79; *Public Prosecutor v Munusamy* [1980] 2 MLJ 133 and *Law Tim Wah v Public Prosecutor* [1978] 1 MLJ 167).

[29] We shall, nevertheless, analyse the submission of learned counsel for the appellant in this case.

THE APPELLANT'S APPEAL

[30] The conviction and sentence of the appellant has been challenged on the following grounds:

(a) the charge framed against the appellant was defective in nature thereby vitiating the entire trial;

(b) the investigation officer ('P12'), did not conduct a full and proper investigation; and

(c) the eye witnesses that gave evidence in the trial were related or were close friends of the deceased which would make them interested witnesses in the trial.

[31] Learned deputy public prosecutor, on other hand, has refuted almost all the contentions of learned counsel for the appellant. She has, therefore, submitted that the appeal filed by the appellant herein should be dismissed and the conviction and sentence under s 302 of the Penal Code passed by the High Court should be affirmed.

[32] We will discuss each of the grounds of appeal in turn.

Ground (a): The charge was defective

[33] It has been contended by much vehemence and less conviction that the charge framed against the appellant was defective and did not give a clear and precise picture of the allegation against the appellant. It was submitted that the charge merely stated that the appellant had committed an offence punishable under s 302 of the Penal Code but did not indicate the section of the offence.; ie whether it fell within ss 299 or 300 of the Penal Code. In other words, the charge failed to indicate whether the offence was culpable homicide or murder.

[34] With respect, in our opinion, this submission is misconceived. It is not sound in principle or supported by authority.

[35] The purpose of framing a charge is to give to the accused a clear, unambiguous and precise notice of the nature of accusation that the accused is called upon to meet in the course of a trial, (see *VC Shukla v State Through CBI,* AIR 1980 SC 962; 1980 SCR (2) 380; *Jagar Singh v Public Prosecutor* [1936] MLJ 92; *Public Prosecutor v Margarita B Cruz* [1988] 1 MLJ 539; *Santosh Kumari v State of Jammu And Kashmir & Ors* [2011] 9 Supreme Court Cases 234, reported in [2012] 2 CLJ 1).

[36] We have no qualms about the general proposition advanced by learned counsel for the appellant that a charge must state the offence which the accused is charged. But how much the definition of the offence should be produced in the charge would depend on whether the offence is known by a specific name in law. In our opinion, in respect of the specific offence of 'murder' punishable under s 302 of the Penal Code, suffice that the charge describes it by the name only. Section 152(2) of the Criminal Procedure Code provides that if the law which creates the offence gives it any specific name, the offence may be described in the charge by that name only.

[37] It is instructive to note that in drafting charges, reference is made only to substantive punishment section and not the definition provision, (see *Rogayah bte Che Mat v Public Prosecutor* [2001] 5 MLJ 77).

[38] In *Hashim bin Mat Isa v Public Prosecutor* [1950] MLJ 94 at p 95, per Willan CJ, the word 'intentionally' was added to a charge of murder. In ruling that it is wrong to include the word 'intentionally' in a charge of murder, the court observed that:

> [to] include the word 'intentionally' in a murder charge is unnecessary, and may cause confusion and embarrassment where the prosecution, at some stage of the trial, find they have to rely for instance on the fourth definition of the offence of murder, which entails proof of knowledge, and no intention.

[39] Looking at the charge framed against the appellant, we are not prepared to hold that the omission to mention ss 299 or 300 in the charge had rendered it defective. As advised by the FM Court of Appeal in *Hashim bin Mat Isa v Public Prosecutor*, the proper form of a murder charge is as set out in the Second Schedule of the Code. So too in this instant case. The charge proffered against the appellant was conformed to a murder charge as set out in the Second Schedule of the Criminal Procedure Code (Act 593) (Revised 1999).

[40] It is important note that the complaint about the charge in this instant case was never raised at earlier stage (the High Court) or in his memorandum of appeal. Learned counsel for the appellant was present in court below and participated fully in the trial. Learned counsel did not see anything wrong with

A the charge and did not complaint at the trial. It was only before this court that this complaint arose. It goes without saying that it is very essence of a counsel duty that he should promptly take objection to every irregularity at the trial, be that an irregularity relating to charge, procedure or to evidence called at the trial. Where, as in this case, he did not object, we take it to mean that he saw
B nothing wrong with the charge framed against the appellant (see *RK Dalmia v Delhi Administration,* AIR 1962 SC 1821; *Om Prakash v State of Uttar Pradesh* AIR 1960 SC 409; *Tulsi Ram and Others v State of Uttar Pradesh* AIR 1963 SC 666).

C **[41]** The proper function of an appellate court is to correct an error in the judgment or proceedings of the court below and not to adjudicate upon a different kind of a dispute that had been never raised before the court below. It is only in exceptional cases that the court may, in its discretion, allow a new point to be raised before it, provided there are good grounds in allowing it to be
D raised and no prejudice to the opponent. The exceptions are not applicable to the present case.

[42] In *Zulkiflee bin Mohd Dom v Public Prosecutor* [1997] 4 MLJ 161, the
E accused was charged under s 420 of the Penal Code ('Act 574') for the offence of cheating. The particulars of the deception practiced on the complainant were not set out in the charge. On appeal against both conviction and sentence, one of the issues which arose for determination concerned the legality of the charge. Augustine Paul JC (as he then was) held, inter alia, that s 154 of the
F Code would render such a charge defective if an objection to its non-compliance is taken before the commencement of the trial. The learned JC was also of the view that the s 156 would not invalidate such a charge if the objection is taken during or at the conclusion of the trial in the circumstances mentioned in the section.

G **[43]** We gratefully adopt the decision of the above case.

[44] We have examined carefully the charge which has been framed against the appellant and we cannot perceive that any prejudice has at all been caused
H to the appellant. The record of appeal contained nothing to show that the appellant was confused, misled or bewildered by the charge.

[45] But just for the sake of argument, lets assume for the moment that the charge was really a defective in nature, the law is well settled that a defect in the
I charge, unless it has the effect of prejudicing any of the accused person, does not vitiate the trial, (see s 156 of the Criminal Procedure Code; *C Mohamed v Public Prosecutor* [1974] 1 MLJ 25; *Low Seng Wah v Public Prosecutor* [1962] 1 MLJ 107; *Kamakanathan v State of Tamil Nadu* [2006] 1 SCC 463; *Harjit Singh v State of Punjab* [2008] 1 SCC (Cri) 72).

[46] Having said that, we would like to put a note of caution here. As observed by Chandrasekhara J in *Annuareddy Sambasiva Reddy v State of AP;* AIR 2009 SC 2661:

> 80. This judgment should not be understood by subordinate courts as sanctioning a deliberate disobedience to the mandatory requirement of the Code, or as giving licence to proceed with trials without an appropriate charge. The omission to frame a charge is a grave defect and should be vigilantly guarded. In some cases, it may be so serious that by itself would vitiate a trial and render it illegal, prejudice to the accused being taken for granted ….

Ground (b): Incomplete investigation

[47] Learned counsel for the appellant submitted that ASP Othman bin Che Senik ('SP21'), the Investigating Officer ('IO'), had failed to do certain things that would otherwise make the investigation process complete. Learned counsel alleged that the IO had failed to ensure that all evidence were properly collected and sketch plan done in detail to show the scene of the crime. The investigation at the scene of the crime was not thorough and all samples taken for analysis were not properly stored and kept. Reliance was placed on certain observation made in *Public Prosecutor v Wong Moy* [1988] 3 MLJ 280; [1988] 2 CLJ 521.

[48] Learned counsel further submitted that the identification parade was not properly conducted and there were errors in the documentation.

[49] We are of the opinion the submission is devoid of merits. As observed by Madras High Court in *P Rajagopal vs The Inspector of Police*, in a judgment dated 19 March 2009 (http://www. indiankanoon.org/doc/13709051):

> 67. If potholes were to be ferreted out from every minor loophole in the process of investigation, no prosecution, possibly, can be found to be free from some or other defect. The basic and the paramount question is whether any lapses in the investigation has resulted in miscarriage of justice by prejudicing the accused persons to any significant extent.
>
> 68. It is fairly well settled that any omission on the part of the investigating officer cannot go against the prosecution in a case of this nature. Interest of justice demands that every 'act' or 'omission' of the investigation officer need not be taken in favour of the accused, for that would amount to giving premium for the lapses of the investigation. Story of prosecution is to be examined dehors such omissions unless such omissions have the tendency to prejudice the accused.

[50] In the instant case, the critical question to be asked is: whether the failure to conduct a complete and detailed investigation tainted the

investigation of the case such that the search for the identity of the assailants was irretrievably lost and whether there were irregularities in the conduct of the identity parade such that threw doubt on the identification of the appellant and other accused persons as having been responsible for the killing or killings.

[51] The High Court has meticulously scrutinised the evidence presented by the prosecution witnesses on this issue and found that the alleged irregularities in the identification parade was of no real consequence. Pragash ('SP2'), Satisgopal ('SP3'), Satish ('SP4') and Thambi ('SP5'), all gave evidence that they knew the three accused persons prior to the events on the fateful night. To that extent the identification parade was of less importance than if the accused had been unknown persons whom the eye witnesses had to identify. In any event, the eye witnesses had identified the three accused as well as two others as persons who were present at the scene of the crime. They had also gone on to give statements to the police as to the identity of the assailants of each of the victims, as well as their individual participation, prior to the identification parade.

[52] The High Court reasoned that the allegation that ASP Othman had immediately prior to the identification parade told the eye witnesses to identify the first, second and third accused as the perpetrators of the killings was not put to ASP Othman on this matter meant that the identification parade cannot be disputed. Several of the eye witnesses also rejected the allegation outright when it was suggested to them. The High Court explained that the eye witnesses would not have 'concocted' the very detailed and coherent version of events they subsequently presented in court just because of what ASP Othman was alleged to have done. Furthermore, there was no cogent reason why ASP Othman would go to the trouble and risk of taking the accused persons to a room and showing them to the eye witnesses, when he could simply have told the eye witnesses verbally to identify the accused persons as the perpetrators.

[53] We are mindful that evidence of identification should always be approached with caution. The main reason is because the fallibility of human observation. It is not enough for identifying witness to be honest; the reliability of his observation must also be tested. This depends on various factors such as lighting, visibility and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accuser's face, voice, build, gait and dress; the result of identification parade, if any, and the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in the light of the evidence and the probabilities (see *R v Turnbull & Ors* [1976] 3 All ER 549;

Jaafar bin Ali v Public Prosecutor [1998] 4 MLJ 406; *Heng Aik Ren Thomas v Public Prosecutor* [1998] 3 SLR 465; *S v Mthetwa* [1972] (3) SA 766 (A)).

[54] The High Court made a finding about the honesty and truthfulness of the eye witnesses. The High Court also had tested their evidence on the identification of the appellant against some of the important factors that we mentioned earlier such as the location of the various eye witnesses, lighting at the place of the incident, what was the deceased doing prior to the fight and after his being stabbed, the direction from which the deceased was stabbed and what happened to the deceased after he was stabbed. We are satisfied that their evidence, considered not in isolation but cumulatively, amount to a reliable identification. There was corroboration for the eye witnesses' version that the appellant was the culprit in the stabbing of the first deceased. We see no reason to doubt the veracity and accuracy of the identification made by them.

[55] Further, it is trite law that the allegation of improper identification parade cannot prevail over the positive and unequivocal identification of the appellant by eye witnesses. Categorical and consistent positive identification, absent any showing of ill motive on the part of the eye witnesses testifying on the matter, prevails over the appellant's defence of denial and alibi.

[56] As the High Court did, we see no reasons to disbelieve the testimonies of these eye witnesses; their testimonies were straight forward and replete with detail that jibed on material points.

Ground (c): Interested witnesses

[57] Learned counsel for the appellant submitted that all eye witnesses that gave evidence for the prosecution were mainly composed of related or close friends to the deceaseds, insinuating thereby the lack of credibility in their testimonies by reasons of comradeship and/or familial royalty. Their evidence should be corroborated by independent witnesses. Reliance was placed on certain observation made by Raja Azlan Shah J (as High Highness was then) in *Liow Siow Long v Public Prosecutor* [1970] 1 MLJ 40; [1969] 1 LNS 98 as follows:

> Testimony of close relations is not tainted if it is otherwise reliable in the sense that the witnesses and competent witnesses who were at the scene of the occurrence and could have seen what had happened. But if it is proved that they are not entirely disinterested witnesses, eg, they are either partisans of the complaint or are in any way inimical to the accused, then their testimony is tainted and requires corroboration if to be acted upon.

[58] We cannot accept the intimidation of learned counsel for the appellant

that these witnesses were biased because they were related or close friends of the deceaseds. Our courts have consistently held that the mere fact that the witnesses were relations or close friends is not proof sufficient to disregard their testimony nor does it render the same less worthy of credit. Rather, the witness's relationship to the victim, far from rendering his testimony biased, would even make it more credible as it would be unnatural for a relative who is interested in seeking justice for the deceased to accuse somebody other than the real culprit.

[59] We are fortified in our view by the observation of His Lordship Ismail Khan J (as he then was) in *Balasingham v Public Prosecutor* [1959] MLJ 193 at p 194:

> After all there is no legal presumption that an interested witness should not be believed. He is entitled to credence until cogent reasons for disbelief can be advanced in the light of evidence to the contrary and the surrounding circumstances.

(see also *Rattan Singh v Public Prosecutor* [1971] 1 MLJ 162, (HC)).

[60] In this instant case, no reason was advanced by the appellant to show that the witnesses had reason to shield the actual culprit and falsely implicate him and other accused persons.

CONCLUSION

[61] In this instant case, it is plain that the High Court had delivered a 'speaking judgment'. The High Court included in its judgment not only factual findings and reasoning leading to conviction of the appellant, but also an account of evidence which it had accepted or rejected, the weight attached to certain evidence and the submissions made to it. It is thus possible for this court to know the basic on which the conviction of the appellant was arrived at, and hence can determine, for example, whether or not the trial court has misdirected itself by misinterpreting evidence or failing to take evidence into account in arriving at its conclusion.

[62] We have scrutinised the record of this case with care and found no appealable error in this case. The High Court found the testimonies of the prosecution witnesses to be credible and we found no reason to disturb the findings of the High Court. The record of this case bereft of any circumstances from which we may infer that the testimonies of the prosecution witnesses are mere concoctions. We agree with the finding of the High Court that although there were some discrepancies, such inconsistencies or imperfections, relate to minor details. Such discrepancies also demonstrate that their testimonies are

spontaneous and unrehearsed. These minor inconsistencies can be attributed to the fallibility of the human memory and the rigor of cross-examination during trial.

[63] The appellant put up the defence of alibi of some sort, asserting that at the time of the first deceased was stabbed, he and the other accused persons had fled the scene. It is trite law that a bare and unsubstantiated denial, being merely self-serving, is itself hardly given credence. Alibi is the weakest of all defences because it is easy to concoct and difficult to prove. In the light of the positive and categorical identification by eye witnesses that the appellant was the perpetrator of the crime charged, the appellant's defence cannot succeed (see *Illian & Anor v Public Prosecutor* [1988] 1 MLJ 421, (SC); *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232, (FC); *Yau Heng Fang v Public Prosecutor* [1985] 2 MLJ 335, (SC); *Ramakrishnan s/o Ramayan v Public Prosecutor* [1983] 3 SLR 645, (HC)).

[64] From what has been discussed above, we found no merit in this appeal. The appellant were rightly convicted and sentenced. We, therefore, dismissed the appeal and affirmed the conviction and sentence passed by the High Court.

Appeal dismissed and conviction and sentence affirmed.

Reported by Ashok Kumar